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Before the  
Federal Communications Commission  
Washington DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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In the Matter of Ameritech  
Michigan Application for  
Authorization Under Section 271 of  
the Communications Act to Provide  
In-Region, InterLATA Service in  
the State of Michigan

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)  
) CC Docket No. 97-137  
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)  
)

Reply Comments of Time Warner Communications Holdings, Inc.

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Dated: July 7, 1997

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the State of Michigan )

**Reply Comments of Time Warner Communications Holdings, Inc.**

Time Warner Communications Holdings, Inc.'s ("TW Comm's") comments filed on June 10, 1997 in response to the Common Carrier Bureau's May 21, 1997 Public Notice<sup>1</sup> issued in the above-referenced proceeding, opposed Ameritech Michigan's ("Ameritech's") May 21, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Michigan. The purpose of these reply comments is to support the comments submitted in this proceeding by the Michigan Public Service Commission ("Michigan PSC")<sup>2</sup> and to assist the Commission in its

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<sup>1</sup> The Common Carrier Bureau solicited comments and reply comments on Ameritech Michigan's Application for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of Michigan by Public Notice, DA 97-1072, released May 21, 1997.

<sup>2</sup> In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan, CC Docket No. 97-137, Consultation of the Michigan Public Service Commission (filed June 10, 1997) (hereinafter "Michigan PSC June 10, 1997 Comments").

efforts to interpret Section 271 of the Telecommunications Act of 1996 ("1996 Act").<sup>3</sup>

In particular, TW Comm supports the Michigan PSC's assertion that many of the difficulties the Commission must overcome in order to analyze accurately whether Ameritech meets Section 271(c)(2)(B)'s Competitive Checklist are attributable to the lack of standards associated with the Competitive Checklist. The Michigan PSC characterized the lack of standards as the "primary problem" with assessing whether Ameritech satisfied the relevant nondiscrimination standards.

The primary problem in assessing Ameritech's compliance with the nondiscrimination standards of the Act and specifically the OSS functions is that, for the most part, sufficient performance standards do not exist by which Ameritech's performance can be judged. There are many examples of the inadequacy of these standards.<sup>4</sup>

To mitigate this difficulty, the Michigan PSC advocated the adoption of performance standards.

[C]omplete and appropriate performance standards have not as yet been adopted which would permit determinations to be made regarding nondiscriminatory access to OSS and other unbundled network elements. Such measures must be in place before a positive determination can be made by the FCC regarding Ameritech's compliance with this competitive checklist.<sup>5</sup>

Without clear standards for the Competitive Checklist as well as for other requirements set forth by Section 271, it is

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<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §§ 151 et seq.).

<sup>4</sup> Michigan PSC June 10, 1997 Comments at 23-24.

<sup>5</sup> Id. at 33-34.

virtually impossible to determine whether Ameritech has satisfied the statute's mandates. It is not surprising that LCI International Telecom Corp. ("LCI") and the Competitive Telecommunications Association ("CompTel") recently petitioned the Commission for an expedited rulemaking concerning the requirements governing operations support systems ("OSS").<sup>6</sup> Like the other items of the Competitive Checklist, OSS development is a prerequisite to functioning competitive markets. The arguments that the LCI/CompTel petition offer in support of the need for the Commission to develop generic standards for OSS are also applicable to all of the specific requirements of the Competitive Checklist.

The difficulty the Commission is facing due to the current lack of standards related to competition in the market for local exchange service is not limited to the lack of standards regarding OSS performance. In fact, TW Comm's June 10, 1997 comments in this proceeding recognized that any action on the Application must be premised on a long-term view of the 1996 Act and its underlying policies. A long-term view of the 1996 Act and its underlying policies requires more than a snap shot determination on market development. On May 1, 1997, TW Comm filed comments with the Commission opposing SBC Communications Inc.'s request for Section 271 authority in Oklahoma, a copy of

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<sup>6</sup> On June 10, 1997, the Commission released a Public Notice seeking comments and reply comments on the LCI/CompTel petition for expedited rulemaking to establish reporting requirements and performance and technical standards for OSS, DA No. 97-1211, released June 10, 1997.

which are attached to these reply comments as Appendix A, that enumerated some of the necessary standards.<sup>7</sup> In those comments TW Comm noted the following:

- (i) Section 271 applications are premature because Congress intended that Section 271 be implemented generically through rulemaking after implementation of the 1996 Act's interconnection provisions, Sections 251 and 252.
- (ii) Section 271 applications are premature because the structure of Section 271 necessitates comprehensive implementation of an ongoing regulatory regime that provides for remedial action in the event of subsequent non-compliance by a Bell Operating Company.
- (iii) A determination on a Section 271 application is premature because parts of Section 271 will necessarily require Commission interpretation before Section 271 may be implemented. Such necessary interpretations include, at a minimum, interpretation of: (a) what constitutes "predominantly" over a "competitor's facilities" and (b) the meaning and scope of the Commission's public interest responsibilities under Section 271.
- (iv) Section 271 applications are premature because the broad language of the statute coupled with the legislative history demonstrates the necessity for generic implementation of Section 271 through rulemaking rather than case-by-case determinations.

As TW Comm's June 10, 1997 Comments in this proceeding stated, although there are undoubtedly benefits to consumers to be gained from making the interLATA interexchange market in Michigan even more competitive through Ameritech's entry, the possible detriments to local competition from Commission action that is not well-considered far outweigh those minor competitive

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<sup>7</sup> In re Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in the State of Oklahoma, CC Docket No. 97-121, Comments of Time Warner Communications Holdings, Inc. (filed May 1, 1997).

benefits. Consideration of Section 271 in a comprehensive manner will better achieve the overall objectives of the Act. Moreover, implementation of Section 271 in a rulemaking proceeding will also substantially decrease the risk that the FCC's implementation of Section 271 will result in subsequent changes to its policies that a court could conclude were arbitrary and capricious.

**CONCLUSION**

For the foregoing reasons, Ameritech's Application for Section 271 Authority in Michigan, submitted on May 21, 1997 should be, in all respects, DENIED.

Respectfully submitted,

**TIME WARNER COMMUNICATIONS  
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TABLE OF CONTENTS

SUMMARY . . . . .	i
INTRODUCTION . . . . .	1
INTEREST AND PERSPECTIVE OF TW COMM . . . . .	2
ARGUMENT . . . . .	8
I.    THE SBC APPLICATION IS PREMATURE . . . . .	8
A.    Congress intended that Section 271 be implemented generically through rulemaking - not on a case-by-case basis - subsequent to implementation of Sections 251 and 252. . . . .	10
1.    Implementation of Sections 251 and 252 are necessary pre-conditions to implementation of Section 271. . . . .	10
B.    The structure of Section 271 necessitates comprehensive implementation of an ongoing regulatory regime that provides for remedial action in the event of subsequent non- compliance by a BOC. . . . .	14
C.    Parts of Section 271 will necessarily require interpretation before the statute can be implemented. . . . .	16
1.    The Commission necessarily will have to interpret what constitutes "predominantly" over a competitor's facilities. . . . .	17

2.	The Commission will have to consider the meaning and scope of its public interest responsibilities under Section 271. . . .	21
D.	The broad language of the statute coupled with legislative history demonstrates the necessity for generic implementation of Section 271 through rulemaking rather than case-by-case determinations. . . . .	23
II.	THE DEFECTS IN THE APPLICATION IDENTIFIED IN THE APRIL 23RD MOTION JUSTIFY DISMISSAL AS ALTS HAS PROPOSED . . . . .	29
CONCLUSION	. . . . .	35

## SUMMARY

Time Warner Communications Holdings, Inc.<sup>1</sup> ("TW Comm") respectfully submits these comments<sup>2</sup> in opposition to SBC Communication's ("SBC's") April 11, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Oklahoma (hereinafter "the Application"). TW Comm also supports the April 23, 1997 Motion to Dismiss the Application filed by the Association for Local Telecommunications Services ("ALTS") (hereinafter "ALTS April 23rd Motion"). TW Comm emphasizes that: (1) the Application is premature and (2) even if it were not premature, the defects in the Application identified in the April 23rd Motion justify the relief ALTS has proposed.

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<sup>1</sup> A wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

<sup>2</sup> The Common Carrier Bureau solicited comments and reply comments on SBC's Application for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma by Public Notice, DA 97-753, released April 11, 1997.

TW Comm Comments  
SBC Section 271 Application  
Oklahoma

In part, the Application is premature because Congress intended that Section 271 be implemented generically through rulemaking after implementation of the 1996 Act's interconnection provisions, Section 251 and 252. In addition, the Application is premature because the structure of Section 271 necessitates comprehensive implementation of an ongoing regulatory regime that provides for remedial action in the event of subsequent non-compliance by a Bell Operating Company. Further, the Application is premature because parts of Section 271 will necessarily require Commission interpretation before Section 271 may be implemented. Such necessary interpretations include, at a minimum, interpretation of: (1) what constitutes "predominantly" over a "competitor's facilities" and (2) the meaning and scope of the Commission's public interest responsibilities under Section 271.

Finally, the Application is premature because the broad language of the statute coupled with the legislative history demonstrates the necessity for generic implementation of Section 271 through rulemaking rather than case-by-case determinations. Consideration of Section 271 in such a comprehensive manner will better achieve the overall objectives of the Act. Implementation

of Section 271 in a rulemaking proceeding will also substantially decrease the risk that the FCC's implementation of Section 271 will result in subsequent changes to its policies that a court could conclude were arbitrary and capricious.

In addition to being premature, the defects in the Application identified in the April 23rd Motion justify dismissal as ALTS has proposed. TW Comm associates itself fully with the arguments presented in the ALTS' April 23rd Motion and urges the Commission to grant the relief requested in the Motion. Specifically, The Application fails to satisfy the requirements of "Track A", 47 U.S.C. § 271(c)(1)(A) or "Track B", 47 U.S.C. § (c)(1)(B).

Under 47 U.S.C. § 271(c)(1)(A), SBC must comply with certain requirements referred to as Track A. Only if the requirements of Track A are not met because competitive local exchange providers have not requested interconnection may SBC seek to comply with the requirements set forth in 47 U.S.C. § 271(c)(1)(B), referred to as Track B. Thus, SBC does not have the choice of pursuing either Track A or B at its option and certainly may not pursue both options simultaneously. In this instance, because there is no dispute that competitive providers

TW Comm Comments  
SBC Section 271 Application  
Oklahoma

have sought interconnection with SBC in Oklahoma and there is no demonstration that those competitors have failed to negotiate in good faith or violated an implementation schedule for the interconnection agreements, the Track B approach is unavailable to SBC in that state.

The Application also fails under Track A. It is apparent that neither SBC nor ALTS claim that SBC has lost substantial market share in the provision of local services in Oklahoma. Nor is there any claim that the vast majority of Oklahoma consumers, either residential or business, have a realistic choice in the facilities used to provide them with local telephone service. The Application's apparent claim that the mere possibility of developing real competition fulfills the Competitive Checklist of Section 271 is devoid of any shred of plausibility in light of the clearly expressed pro-competitive policies underlying the 1996 Act.

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INTRODUCTION

Time Warner Communications Holdings, Inc.<sup>1</sup> ("TW Comm") respectfully submits these comments<sup>2</sup> in opposition to SBC Communication's ("SBC's")<sup>3</sup> April 11, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Oklahoma (hereinafter "the Application"). TW Comm also supports the April 23, 1997 Motion to Dismiss the Application filed by the Association for Local Telecommunications

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<sup>1</sup> A wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

<sup>2</sup> The Common Carrier Bureau solicited comments and reply comments on SBC's Application for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma by Public Notice, DA 97-753, released April 11, 1997.

<sup>3</sup> SBC and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Long Distance ("SBLD") collectively sought authority for SBLD to provide in-region, interLATA services in Oklahoma.

Services ("ALTS") (hereinafter "ALTS April 23rd Motion").

INTEREST AND PERSPECTIVE OF TW COMM

TW Comm is an emerging facilities-based provider of local telecommunications services. As such, it is a competitor of Southwestern Bell Telephone Company ("SWBT") in the provision of local services as well as a customer of SWBT's incumbent carrier operations to the extent that TW Comm must purchase services from SWBT in order to interconnect with SWBT's network. Although TW Comm does not operate in Oklahoma, it does operate in Texas, another state in which SBC is the incumbent local exchange carrier ("ILEC"), and the Commission's decision in this matter will have a significant effect on those operations. It is also TW Comm's view that the first case regarding Section 271 that the Commission decides on the merits will inevitably set precedent for other applications by incumbent Bell Operating companies ("BOCs") for states in which TW Comm is currently operational.

Without its own experience as a competitor in Oklahoma, TW Comm cannot address those aspects of either the Application or the April 23rd Motion that relate to the specifics of competition within that jurisdiction. However, TW Comm has experienced significant difficulties while implementing its interconnection



with SWBT in the Austin, Texas area, that have a direct and immediate effect on TW Comm's ability to enter that market successfully. In Texas, it appears to be absolutely necessary that SWBT have a business incentive to cooperate with competitors such as TW Comm.

It is apparent that neither SBC nor ALTS claims that SBC has lost substantial market share in the provision of local services in Oklahoma. Nor is there any claim that the vast majority of Oklahoma consumers, either residential or business, have a realistic choice in the facilities used to provide them with local telephone service. Based on the apparent state of competition in Oklahoma, SBC's claims for Section 271 relief essentially boil down to assertions that (1) it has "opened the door" to competition through interconnection arrangements that it has entered into and (2) the statutory tests for Section 271 relief do not require anything more. These assertions are grossly flawed because, as demonstrated below and in the ALTS April 23rd Motion, they misrepresent the statute and the nature of marketplace change it requires before incumbent BOCs may be permitted into interLATA markets.

It is not an overstatement to characterize Section 271 and its companion, Section 272, as constituting the heart of the Telecommunications Act of 1996. One of the fundamental competitive "bargains" of the Act is the requirement that the BOCs open their local markets to competition prior to the right to provide interLATA toll service in those same markets. As noted by the Commission itself:

The 1996 Act opens local markets to competing providers by imposing new interconnection and unbundling obligations on existing providers of local exchange service, including the BOCs. The 1996 Act also allows the BOCs to provide interLATA services in the states where they currently provide local exchange and exchange access services once [after] they satisfy the requirements of section 271. . . . [T]he statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market.<sup>4</sup>

This presents a "win-win" situation for consumers because they receive the benefits of increased competition in both toll and local markets: more efficient, more attentive service, greater

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<sup>4</sup> In re the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, para. 7 (Dec. 24, 1996) (emphasis and interpretation added) (hereinafter "First Report and Order").

innovation and, of course, lower prices.<sup>5</sup>

The statutory linkage between opened, competitive local service markets and entry by a BOC such as SBC into interLATA markets makes it incumbent upon the Commission to tread very warily as it starts down the Section 271 road. Entry into the interLATA market is the single most significant inducement for the BOCs to meet the Competitive Checklist requirements of section 271(c)(2)(B). It is the carrot. Once the carrot is eaten, however, the inducement is gone. Once a BOC is permitted to provide in-region interLATA service, its incentive to make local service interconnection workable in that region is removed. One need look no further than the rearguard actions of the non-BOC ILECs in opposition to open interconnection arrangements to find validation of this incentive principle.<sup>6</sup> The most

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<sup>5</sup> The Commission further noted within that same Order:

With the removal of legal, economic, and regulatory impediments to entry, providers of various telecommunications services will be able to enter each other's markets and provide various services in competition with one another.

Id.

<sup>6</sup> It is no coincidence that the legal challenges to the Commission's August 8, 1996 Interconnection Order, In re

obstreperous behavior and the greatest resistance to implementation of competitive market entry is displayed by ILECs who do not have such incentives.

Thus, the Application squarely places before the Commission the formidable challenge of implementing Section 271 for the first time. It does so, however, at a time when the Commission, in fulfillment of its other heavy responsibilities under the 1996 Act, has not yet had the opportunity to consider comprehensively the necessarily complex issues inherent in the statute's implementation. While there are undoubtedly benefits to consumers to be gained from making the interLATA interexchange market in Oklahoma more competitive through SBC's entry, the possible detriments to local competition from Commission action that is not well-considered far outweigh those benefits, particularly in light of the fact that any action herein will be a precedent for future applications by other BOCs. Thus, TW Comm urges that any action on the Application be premised on a long-

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Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (Aug. 8, 1996), now before the Eighth Circuit in Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases, were brought by GTE, a non-BOC ILEC. GTE and other non-BOC ILECs that are not subject to Section 271 have been among the most litigious opponents to implementation of the 1996 Act.

term view of the Act and its underlying policies.

Indeed, assuming only for the sake of argument that the Application provides an accurate portrayal of the service that SBC provides to competitive local exchange carriers ("CLECs") in Oklahoma, SWBT's behavior in Oklahoma is inconsistent with its behavior in Texas. As a customer, and an emerging competitor of SWBT in Texas, TW Comm has first hand knowledge that, for example, SWBT has not provided non-discriminatory access to directory assistance, reasonable inclusion of competitors in SWBT's white pages listings,<sup>7</sup> or nondiscriminatory central office collocation as compliance with the competitive checklist of Section 271 would require. This points up the inherent danger in relying on the narrow factual base relating to a jurisdiction such as Oklahoma - clearly not representative of the nation as a whole - as the basis for establishing precedent or policy in the implementation of Section 271. The factual circumstances involving a particular Section 271 application, by definition, can relate only to a particular state, and cannot be assumed to be representative of the region in which that particular BOC

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<sup>7</sup> Indeed, SWBT has used its white page directories to publish its anti-competitive views, prefacing its 1995 Directory with an admonition against competitive telephone service entitled, "Beware of imitation brands."

provides service or the nation generally. Given the statutory interpretation and policy issues which must accompany any application of Section 271, it is apparent that this statute is particularly ill-suited to case-by-case implementation, and that this particular application of SWBT in Oklahoma is a poor vehicle as the first Section 271 case.

#### **ARGUMENT**

The Application should be dismissed because (1) the issues it raises cannot be reasonably addressed by the Commission at this time and at this juncture of the implementation of the Telecommunications Act of 1996 (i.e. the Application is premature); and (2) even if the Application were not premature, it is defective in its failure to address certain critical issues. These points are each addressed below.

#### **I. THE SBC APPLICATION IS PREMATURE**

The Application is premised on the assumption that Section 271 is self-actuating and does not require prior interpretive or other action by the Commission before it can be implemented. In other words, SBC has assumed that it is possible to divine the statutory section's requirements from its text and to submit information that would fulfill those requirements at

this stage of the implementation of the Telecommunications Act of 1996, without any further action on the part of the Commission or the courts.

However, this assumption is simply incorrect. Like virtually all other provisions of the 1996 Act, implementation of Section 271 cannot occur in isolation but requires the context of the implementation of other provisions, particularly Sections 251 and 252 dealing with issues of interconnection requirements as well as negotiation, arbitration and approval of interconnection agreements. Given that the statute also is not clear on its face and in any event contemplates an ongoing regulatory regime, it is apparent that reasonable implementation of Section 271 will first require the Commission to address a number of policy issues, most probably in the context of a rulemaking. SBC's creative and erroneous interpretation of Section 271(c)(1)(B) provides further support for the need for such a proceeding.

- A. Congress intended that Section 271 be implemented generically through rulemaking - not on a case-by-case basis - subsequent to implementation of Sections 251 and 252.
- 

1. Implementation of Sections 251 and 252 are necessary pre-conditions to implementation of Section 271.
- 

As noted supra at page 5, implementation of Section 271 is linked to the implementation of Sections 251 and 252. This linkage exists in order to provide an incentive for the BOCs to open their local service markets to competition. As the Commission emphasized in its recent order on Non-Accounting Safeguards,<sup>8</sup> the statute's requirement that BOC's comply with Section 271(c)(2)(B)'s Competitive Checklist before it may provide in-region interLATA service is central to achieving the competitive goals of the 1996 Act:

[T]he statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing

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<sup>8</sup> In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, para. 8 (Dec. 24, 1996) (hereinafter "First Report and Order").



interexchange carriers could enjoy an advantage from being the first to enter the other's market.<sup>9</sup>

In fact, the Competitive Checklist of Section 271(c)(2)(B) explicitly requires a BOC's implementation of specific provisions of Sections 251 and 252 as a condition precedent to obtaining interLATA entry.<sup>10</sup> Thus, it is apparent that until the Commission took steps to implement Section 251 and 252 on August 8, 1996<sup>11</sup>, it would not have been possible for the Commission under the terms of the statute to grant any BOC application under Section 271.

However, despite the issuance of the Interconnection Order, the Application is premature because the August 8, 1996 Interconnection Order has been challenged on appeal and portions of it have been stayed. The pendency of the Eighth Circuit appeal and its accompanying stay<sup>12</sup> precludes the development of permanent interconnection rates that are one of the prescribed

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<sup>9</sup> Id.

<sup>10</sup> 47 U.S.C. Section 271 (c)(2)(B)(i)-(xiv).

<sup>11</sup> In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (Aug. 8, 1996).

<sup>12</sup> Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases (8th Cir. Oct. 15, 1996).